

AUG 13 2003

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

MIGUEL TROCHES,

Petitioner - Appellant,

v.

CAL A. TERHUNE, Director, Department of
Corrections,

Respondent - Appellee.

No. 02-56873

D.C. No. CV-98-03011-WDK

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Argued and Submitted August 5, 2003
Pasadena, California

Before: ALDISERT,** TALLMAN, and RAWLINSON, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

In his habeas petition, Miguel Troches contended that the state trial court committed constitutional error by allowing the amendment of the information to include a second-degree burglary charge. Troches, however, failed to demonstrate that the state court's decision was contrary to or an unreasonable application of clearly established United States Supreme Court precedent. *See Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). Neither *Cole v. Arkansas*, 333 U.S. 196 (1948), nor *In re Oliver*, 333 U.S. 257 (1948), foreclose the premise that constitutionally adequate notice may come from evidence presented at trial. *See Stephens v. Borg*, 59 F.3d 932, 936 (9th Cir. 1995).

Troches' case is distinguishable from *Gray v. Raines*, 662 F.2d 569 (9th Cir. 1981). Unlike the defendant in *Gray*, Troches could not claim that his intent to commit burglary was his "entire defense." *See id.* at 573. Rather, Troches' testimony was an admission that supported amendment of the information, since California law permits the amendment of an information at any point in the proceedings. *See* Cal. Penal Code § 1009. The trial testimony and evidence therefore provided constitutionally adequate notice of the burglary charge. *See Murtishaw v. Woodford*, 255 F.3d 926, 954 (9th Cir. 2001) (citation omitted).

PETITION DENIED.